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The obligation to extradite or prosecute (*aut dedere aut judicare*)

Comments and information received from Governments

Addendum

II. Comments and information received from Governments

A. General comments

United States of America

1. The United States of America believes that its practice, and that of other countries, reinforces the view that there is not a sufficient basis in customary international law or State practice to formulate draft articles that would extend an obligation to extradite or prosecute beyond binding international legal instruments that contain such obligations.

2. The United States does not believe that there is a general obligation under customary international law to extradite or prosecute individuals for offences not covered by international agreements containing such an obligation. Rather, the United States believes that States only undertake such obligations by joining binding international legal instruments that contain extradite or prosecute provisions and that those obligations only extend to other States that are parties to such instruments. A number of important policy interests support this conclusion and practice.

3. First, in the context of an offence-creating convention to which a State is a party, there is no question that the State in which an offender is found will have criminalized and established jurisdiction over the offence in question. But if the obligation to extradite or prosecute were freestanding, that would not always be the case. One State could request the extradition of a person from another State in which the conduct in question was not a crime (and for which, as a result, extradition would not normally be available, as it generally requires dual criminality), and the

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State which had not criminalized the conduct would nevertheless be required to prosecute the person. Such a result would put the requested State in an untenable position where its domestic law would preclude both prosecution and extradition.

4. Second, and similarly, a freestanding obligation to extradite or prosecute could be seen as implying an obligation to extradite even in the absence of treaties or other legal provisions that might be required by a State as a matter of domestic law to authorize such action. In the United States, for example, a treaty relationship is required (with very limited exceptions) in order for the United States to extradite an offender to a requesting State. Therefore, if a State found that it lacked jurisdiction to prosecute an offender for an offence for which extradition was requested by a State with which it did not have treaty relations, an International Law Commission article establishing an obligation to extradite or prosecute could purport to require the State to extradite the offender even though it lacked the legal authority to do so under domestic law.

5. Third, if there were a broad State practice of applying an extradite or prosecute regime, one would expect that most States would have enacted laws that generally confer extraterritorial jurisdiction over most offences based solely on the offender being found within their territory. This is not the case for the United States and, in its experience, it is not the case for many other States as well. To the contrary, such "found in" jurisdiction is quite limited and based primarily on the obligations of specific treaties. Thus, adoption of an extradite or prosecute regime would suggest a need for many States to dramatically expand their extraterritorial jurisdiction over offences committed anywhere in the world.

6. Fourth, States around the world make and entertain thousands of extradition requests every year. Among those cases, there are undoubtedly many in which the requesting State would not want the requested State to prosecute the case if extradition were not possible. Extradition allows for the vindication of the rights and interests of the victim and the State where the offence occurred in a way that prosecution in a foreign State cannot always meet. Furthermore, there may be cases in which it is impossible for the requested country to prosecute because the underlying investigation did not comport with procedures required by its laws.

7. Finally, a decision by a State to enter into an extradition relationship with another State involves important considerations with respect to the other State's adherence to rule of law, due process, human rights and other norms. A general obligation to extradite or prosecute would intrude on the sovereignty of States by either purporting to impose such a relationship where it was not desired by the State or requiring that State to undertake a sovereign act — prosecution — that it did not desire to undertake for legal, policy or other reasons.

8. The United States believes that the International Law Commission should therefore not formulate draft articles on this topic. Rather, it should conclude that no such obligation exists outside international treaties.

B. International treaties by which a State is bound, containing the obligation to extradite or prosecute (*aut dedere aut judicare*), and reservations made by that State to limit the application of this obligation

Latvia

9. Latvia is party to several international treaties containing the obligation to extradite or prosecute,[1] namely the European Convention on Extradition, 1957; the Convention for the Suppression of Unlawful Seizure of Aircraft, 1970; the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1971; the Additional Protocol to the European Convention on Extradition, 1975; the European Convention on the Suppression of Terrorism, 1977; the Second Additional Protocol to the European Convention on Extradition, 1978; the International Convention against the Taking of Hostages, 1979; the Convention on the Physical Protection of Nuclear Material, 1979; the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988 and its Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf, 1988; the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1988; the Criminal Law Convention on Corruption, 1999; the International Convention for the Suppression of the Financing of Terrorism, 1999; the United Nations Convention against Transnational Organized Crime, 2000; the Protocol amending the European Convention on the Suppression of Terrorism, 2003; and the United Nations Convention Against Corruption, 2003.

10. Latvia is also bound by various bilateral treaties containing the obligation: the Agreement with the Republic of Estonia and the Republic of Lithuania on Legal Assistance and Legal Relations, 11 November 1992; the Agreement with the Russian Federation on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters, 3 February 1993; the Agreement with the Russian Federation on Transfer of Sentenced Persons, 4 March 1993; the Agreement with the Republic of Moldova on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters, 14 April 1993; the Agreement with the Republic of Belarus on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters, 21 February 1994; the Agreement with the Republic of Poland on Legal Assistance and Legal Relations in Civil, Family, Labour and Criminal Matters, 23 February 1994; the Agreement with Ukraine on Legal Assistance Relations and Legal Relations in Civil, Family and Criminal Matters, 23 May 1995; the Agreement with the Kyrgyz Republic on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters, 10 April 1997; the Agreement with the Government of the Republic of Uzbekistan on Legal Assistance and Legal Relations in Civil, Family, Labour and Criminal Matters, 23 May 1997; and the Treaty on Extradition with Australia, 14 July 2000.

[1] The details of multilateral treaties previously cited are not reproduced in the present addendum as they can be found in the original report (A/CN.4/579) and its first addendum (A/CN.4/579/Add.1).

Serbia

11. The obligation to extradite or prosecute an alleged offender is regulated in a number of international conventions in force between Serbia and other countries. The application of internal law (trial taking place in the country which has refused the extradition request) has been provided for in some of these conventions or as a possibility in others.

12. Serbia has signed or acceded to a number of international instruments, notably the European Convention on Extradition, 1957; the Convention for the Suppression of Unlawful Seizure of Aircraft, 1970; the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1971; the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 1973; the European Convention on the Suppression of Terrorism, 1977; the International Convention against the Taking of Hostages, 1979; the Convention on the Physical Protection of Nuclear Material, 1979; the International Convention for the Suppression of the Financing of Terrorism, 1999; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984; the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988; the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988; the International Convention for the Suppression of Terrorist Bombings, 1997; the Council of Europe Criminal Law Convention on Corruption, 1999; and the United Nations Convention against Transnational Organized Crime, 2000.

13. Serbia has also concluded bilateral extradition treaties with Algeria, Austria, Belgium, Bulgaria, the Czech Republic, France, Germany, Greece, Hungary, Iraq, Italy, Mongolia, the Netherlands, Poland, Romania, the Russian Federation, Slovakia, Spain, Switzerland, the former Yugoslav Republic of Macedonia, Turkey, the United Kingdom of Great Britain and Northern Ireland and the United States.

14. The above bilateral treaties do not specifically regulate matters related to extradition or prosecution. However, a number of them, inter alia, state as a reason to refuse extradition the jurisdictional competence of the requested State to prosecute, meaning that in case extradition is declined, criminal proceedings against the person whose extradition has been refused may be instituted in the requested State. On the other hand, a number of such treaties provide that in the case when criminal proceedings have already been initiated for the same offence, the extradition request will be declined.

15. In view of the foregoing, when a foreigner commits an offence abroad, there is a possibility that the foreigner will be extradited from Serbia to the requesting State (which is what normally happens). However, if the extradition request is denied, there is the obligation to prosecute the alleged offender in Serbia for the same offence under the terms of either the national legislation or an international treaty which has precedence over the national legislation.

16. Similarly, the nationals of Serbia, who cannot be extradited to another country, may be prosecuted in Serbia for offences committed abroad under the terms of the national legislation or relevant international treaties.

Sri Lanka

17. Sri Lanka is a party to the following treaties containing the obligation to extradite or prosecute, and upon subscribing to these treaties, it has not entered any reservation to limit the application of the obligation: the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 1949; the Geneva Convention for the Amelioration of the Conditions of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, 1949; the Geneva Convention relative to the Treatment of Prisoners of War, 1949; the Geneva Convention relative to the Protection of Civilian Persons in Time of War, 1949; the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 1950; the Convention for the Suppression of Unlawful Seizure of Aircraft, 1970; the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1971; the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 1973; the International Convention against the Taking of Hostages, 1979; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984; the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988; the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Montreal Convention, 1988 (Montreal Protocol); the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988; the Convention on the Marking of Plastic Explosives for the Purpose of Detection, 1991; the International Convention for the Suppression of Terrorist Bombings, 1997; the International Convention for the Suppression of the Financing of Terrorism, 1999; and the United Nations Convention against Transnational Organized Crime, 2000. Moreover, Sri Lanka has signed the International Convention for the Suppression of Acts of Nuclear Terrorism, 2005. It will be ratified shortly, after framing necessary legislation.

18. At the regional level, Sri Lanka has subscribed to regional conventions that provide for the obligation to extradite or prosecute. Accordingly, within the South Asian Association for Regional Cooperation (SAARC) Sri Lanka subscribed to the SAARC Regional Convention on Suppression of Terrorism, 1987 and its Additional Protocol, 2004; and the SAARC Convention on Narcotic Drugs and Psychotropic Substances, 1990.

19. Finally, Sri Lanka has signed bilateral extradition treaties with the Hong Kong Special Administrative Region of China, the Maldives and the United States. There are also several pre-independence extradition treaties which could be given effect to, on a case-by-case basis, under the provisions of the Extradition Law No. 8 of 1977.

United States of America

20. The United States is a party to a number of international conventions that contain the obligation to extradite or prosecute. Among those conventions are the Convention for the Suppression of Unlawful Seizure of Aircraft, 1970; the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1971; the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 1973; the International Convention against the Taking of Hostages, 1979; the Convention on the Physical Protection of Nuclear Material, 1979; the Protocol for the Suppression

of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Montreal Convention, 1988 (Montreal Protocol); the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988; the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, 1988; the International Convention for the Suppression of Terrorist Bombings, 1997; and the International Convention for the Suppression of the Financing of Terrorism, 1999.

21. The United States believes that commitments to extradite or prosecute as contained in these conventions are an important aspect of collective efforts to deny terrorists and other criminals a safe haven. The United States strongly supports the implementation of such provisions in international instruments.

22. The United States notes, however, that recent multilateral criminal law conventions do not uniformly impose extradite or prosecute regimes. Rather, recent conventions of wide application and great importance such as the United Nations Convention against Transnational Organized Crime, 2000; the Council of Europe Convention on Cybercrime, 2001; and the United Nations Convention against Corruption, 2003, impose an obligation on a State in which an offender is found to prosecute that offender only when (a) extradition is denied on the basis of the na ionality of the offender; and (b) prosecution is requested by the requesting State. Thus, the consensus in the international community suggests that strict extradite or prosecute obligations should apply only to limited categories of the most serious crimes and only to those States that have undertaken such an obligation (and the requisite changes to their criminal and jurisdictional laws) by becoming a party to a legally binding international instrument that encompasses such crimes.

23. The United States has not taken reservations to limit the application of the obligation to extradite or prosecute per se. When becoming a party to these conventions, however, the United States has consistently taken the position that the extradition obligations within the conventions apply only to expand the bases for extradition with countries with which the United States has bilateral extradition treaties. The United States does not use multilateral conventions as a basis for extradition in the absence of a bilateral treaty. This is because, for the United States, extradition is a function of treaty relationships; there is no obligation to extradite absent a bilateral treaty. The obligation to extradite or prosecute is similarly limited.

C. Domestic legal regulation adopted and applied by a State, including constitutional provisions and penal codes of criminal procedures, concerning the obligation to extradite or prosecute

Latvia

24. In Latvia the obligation to extradite or prosecute (*aut dedere aut judicare*) is regulated by the Constitution of the Republic of Latvia, the Citizenship Law and the Criminal Procedure Law.[2] In accordance with article 98 of the Constitution everyone has the right to freely depart from Latvia. Everyone having a Latvian passport shall be protected by the State when abroad, and has the right to freely return to Latvia. A citizen of Latvia may not be extradited to a foreign country,

[2] Excerpts of national law provided by the Government of Latvia are available for consultation at the Codification Division of the Office of Legal Affairs of the Secretariat.

except in the cases provided for in international agreements ratified by the Parliament and under the condition that the basic human rights specified in the Constitution are not violated by the extradition.

25. The above-mentioned issue is regulated by Part C, entitled "International Cooperation in the Criminal-Legal Field", of the Criminal Procedure Law. Chapter 64 of Part C, "General Provisions of Cooperation", determines different types of international cooperation. Chapter 65, "Extradition of a Person to Latvia", contains articles referring to provisions and procedures for the submission of a request for the extradition of a person; grounds and procedures for the announcement of an international search for a person; request for temporary detention; takeover of a person extradited by a foreign State; extradition of a person from a foreign State for a period of time; frameworks of the criminal liability and of the execution of a penalty of a person extradited by a foreign State; inclusion of the time spent in detention in a foreign State; extradition of a person to Latvia from a European Union member State; procedures for the taking of a European detention decision; fulfilment of a European detention decision; and conditions connected with the takeover of a person from a European Union member State.

26. Chapter 66, entitled "Extradition of a Person to a Foreign State", establishes principles for extradition of a person. First, a person who is located in the territory of Latvia may be extradited for criminal prosecution, litigation or the execution of a judgement if a request has been received from a foreign State to extradite such person regarding an offence that, in accordance with the law of Latvia and the foreign State, is criminal. Second, a person may be extradited for criminal prosecution, or litigation, regarding an offence the commission of which entails a penalty of deprivation of liberty whose maximum duration is not less than one year, or a more serious penalty. Third, a person may be extradited for the execution of a judgement by the State that rendered the judgement and convicted the person with a penalty that is connected with deprivation of liberty for a period of not less than four months. Fourth, if extradition has been requested regarding several criminal offences, but extradition may not be applied for one of the offences because that offence does not comply with the conditions regarding the possible or imposed penalty, the person may also be extradited regarding such criminal offence.

27. If for some reason Latvia is not able to extradite a person, there is a possibility to take over criminal proceedings or to take over a judgement for recognition and fulfilment. In accordance with Chapter 67, "Takeover in Latvia of Criminal Proceedings Commenced in a Foreign State", and Chapter 68, "Transfer of Criminal Proceedings Commenced in Latvia", of the Criminal Procedure Law, the takeover of criminal proceedings is the continuation in Latvia of criminal proceedings commenced in a foreign State, on the basis of a request of the foreign State or with the consent thereof, if such continuation is required by procedural interests and the offence is punishable in accordance with the Criminal Law of Latvia. Transfer of criminal proceedings is the suspension thereof in Latvia and the continuation thereof in a foreign State, if there are grounds for holding a person suspect, or prosecuting a person, for the commission of an offence, but the successful and timely performance of the criminal proceedings in Latvia is not possible or hindered and, in addition, transfer to the foreign State prevents such impossibility or hindrance. The transfer of criminal proceedings in which a judgement of conviction has entered into effect shall be admissible only if the judgement may not be executed in Latvia, and the

foreign State in which the convicted person resides does not accept a judgement of another State for execution.

28. Chapter 71, entitled "Execution in Latvia of a Sentence Imposed in a Foreign State", of the Criminal Procedure Law establishes content and conditions of the execution of a sentence imposed in a foreign State. In accordance with terms of the Criminal Procedure Law, the execution in Latvia of a sentence imposed in a foreign State is the uncontested recognition of the justification and lawfulness of such sentence and the execution thereof in accordance with the same procedures, as if the sentence were specified in criminal proceedings taking place in Latvia. Furthermore, the recognition of the justification and lawfulness of a sentence imposed in a foreign State shall not exclude the coordination thereof with the sanction provided for in the Criminal Law of Latvia regarding the same offence. Article 777 of the Criminal Procedure Law determines that the execution of a sentence imposed in a foreign State shall be possible if (a) Latvia has a treaty with the foreign State regarding the execution of sentences imposed by that State; (b) a foreign State has submitted a request regarding the execution of the sentence imposed in that State; (c) the sentence has been specified in the foreign State with a valid adjudication in completed criminal proceedings; (d) the convicted person could be penalized regarding the same offence in accordance with the Criminal Law of Latvia; (e) a limitation period for the execution of the sentence has not come into effect in the foreign State or in Latvia; (f) at the moment of the rendering of a judgement, a limitation period of criminal liability had not come into effect in accordance with the Criminal Law of Latvia; and (g) at least one of the reasons for the submission of a request for the execution of a sentence referred to in Section 804 of the Criminal Procedure Law of Latvia exists in the foreign State.

29. Chapter 72, "Execution in a Foreign State of a Sentence Imposed in Latvia", of the Criminal Procedure Law provides that the execution in a foreign State of a sentence imposed in Latvia is the recognition of the justification and lawfulness of such sentence and the execution thereof, in accordance with the same procedures as if the sentence were specified in criminal proceedings taking place in the foreign State.

Serbia

30. The issue of extradition or prosecution in Serbia is also regulated by its internal law.

31. It should be emphasized in particular that the Criminal Procedure Code regulates in specific sections, inter alia, matters related to extradition of accused or convicted persons and other forms of international legal aid (general forms of such assistance, transferring and taking over prosecution, execution of foreign judicial decisions).

32. In respect of extradition, but also with respect to other forms of international legal assistance in criminal matters, the Criminal Procedure Code gives precedence to international treaties. In fact, its provisions are applicable only in case of non-existence of an international treaty, but in the case when it does apply, the Criminal Procedure Code will not regulate certain matters.

33. This disposition is in conformity with the Constitution of Serbia, which stipulates that generally accepted rules of international law and ratified international

treaties form an integral part of the legal system of Serbia and that they are implemented directly. Furthermore, international treaties must not contravene the Constitution, whereas the laws and other general legal acts adopted by Serbia must not be contrary to the ratified international instruments and generally accepted rules of international law.

34. The Constitution of Serbia does not contain any provision relating to the extradition of accused or sentenced persons.

35. Neither the extradition of accused or sentenced persons, nor their possible prosecution in Serbia is made conditional on the existence of an international treaty. Consequently, if there is no international treaty, then in matters of extradition or prosecution in international legal relations, provisions of a domestic law will apply.

36. The Criminal Procedure Code, which establishes requirements for the extradition of accused or sentenced persons and considerations to be taken into account in refusing extradition of such persons, as well as the procedure for determining these considerations, does not specifically provide for the obligation or duty to extradite or prosecute (*aut dedere aut judicare*).

37. However, regarding extradition or prosecution, the Criminal Procedure Code does not allow extradition to another country of a national of Serbia. Nor does it provide for the extradition of a foreigner for an offence against Serbia or its nationals irrespective of whether the offence was committed in the territory of Serbia or outside it. Accordingly, the Criminal Procedure Code provides for the jurisdictional competence of Serbia in regard to prosecution, i.e. prosecution will be undertaken in Serbia.

38. Under the Criminal Procedure Code, a foreigner may be extradited if criminal proceedings against him or her have not been instituted in Serbia for an offence against Serbia or its national, or in case criminal proceedings have been initiated, if a security bond has been posted to ensure the claim of the injured party.

39. Of particular relevance for the obligation to extradite or prosecute in national legislation are the solutions contained in the provisions of the Penal Code of Serbia relating to the geographic scope of criminal legislation in Serbia (applicability of criminal legislation as regards where the offence has been committed). These provisions regulate the enforcement of criminal legislation of Serbia if an offence has been committed in its territory. However, these provisions may also apply if the offence has been committed outside the territory of Serbia. This is particularly true in cases when a foreign country, where the offence has been committed, has not requested extradition of an alleged offender, or if extradition has been requested but refused for some reason.

40. When an offence has been committed in the territory of Serbia, under its Penal Code, the main principle to be applied is the territorial one, meaning that the criminal legislation of Serbia will apply to all offences committed on its territory, whatever the nationality of the alleged offender. This principle has been expanded to include the nationality of a vessel or an aircraft. The Penal Code provides for the possibility to transfer prosecution to another country, in particular if the offence concerned carries a sentence of up to 10 years in prison, or if it is an offence against the safety of public transport, regardless of the sentence it carries. If a foreign country has either instituted or completed proceedings for an offence committed in the territory of Serbia, prosecution in Serbia for the same offence may only be

pursued upon approval of the Public Prosecutor of the Republic. Exemptions from the application of the territorial principle are those envisaged by public international law (e.g. persons enjoying full diplomatic immunity), in which case national legislation will apply.

41. The criminal legislation of Serbia also applies to everyone (national or foreigner) who commits an offence abroad to the detriment of Serbia. Such offences are those against the constitutional system and security of Serbia, except for the criminal incitement of national, racial or religious hatred, division or intolerance, as well as money counterfeiting, if national currency has been counterfeited. In all the above cases the principle of an absolute application of the law of Serbia is applicable.

42. The criminal legislation of Serbia also applies to its national when he or she has committed any other offence abroad, or if found in the territory of Serbia or if he or she has been extradited to Serbia. The reason for the application of this active personality principle is that a national of Serbia, by coming to his or her own country, should not escape criminal responsibility for any offence he or she committed abroad, in the light of the fact that he or she cannot be handed over to another country. According to this principle, the criminal legislation of Serbia will be applicable even to an offender who becomes its national after he or she has committed the offence in question. Such a provision was necessary to ensure prosecution of offenders who may not be extradited to another country because they were foreigners at the time of commission of the offence. These cases may be prosecuted in Serbia only if foreign criminal law has not been applied or if such an offence is made punishable also under the laws of the country where the offence occurred. If not, in order to proceed to prosecution in Serbia, it will be necessary to obtain the approval of the Public Prosecutor of the Republic.

43. The criminal legislation of Serbia will also apply to a foreigner outside its territory who has committed any offence against it or its national, if he or she is found in its territory or if surrendered to it. Such an individual may be prosecuted only on condition that the offence committed is also punishable under the law of the country where it was committed. If this is not the case, the Public Prosecutor of the Republic must consent to such prosecution.

44. Similarly, the criminal legislation of Serbia is further applicable to a foreigner who commits against a foreign country or another foreigner abroad an offence punishable under the criminal law of the country where it was committed by an imprisonment of not less than five years or by a harsher sentence (universal principle). In addition, the requirements for the application of this principle include that the foreigner is found in its territory but is not extradited, and that the offence is also punishable under the laws of the country where it has been committed. As regards the requirement that the offence concerned is also considered as an offence under a foreign law, there is one exception: the offence is to be considered as such under the principles of law recognized by the international community. Prosecution may then, pursuant to the Penal Code of Serbia, be pursued once the Public Prosecutor of the Republic has approved it. In the case of application of national legislation, the accused person may not be condemned to a more severe sentence than that provided for under the criminal legislation of the country where the offence occurred.

45. In view of the foregoing, the criminal legislation of Serbia and the universal principle will be applied only if no foreign country has requested the extradition of a foreigner or if the extradition request has been refused.

46. In the case when the request for extradition has been refused, there is both the need and justification to apply the criminal legislation of Serbia, i.e. to prosecute in Serbia so that the foreigner in question be held criminally liable or face punishment. In this context, the application of domestic law (i.e. the trial) may be seen also as the obligation of the country refusing the extradition. Hence, it is in such cases that the application of the *aut dedere aut judicare* principle is fully reflected.

47. As a rule, the judicial practice in Serbia allows the extradition of foreigners provided all requirements for it have been met. For this reason, application of the universal principle is very uncommon. However, this does not diminish the importance of the principle ensuring that an alleged offender may be prosecuted at all times to avoid escaping criminal liability.

48. Furthermore, concerning the active nationality principle and the universality principle, prosecution in Serbia will not be pursued: (a) if the offender has served full term of the sentence he or she has received in a foreign country; (b) if the offender has been cleared by a legally valid judicial decision or if his or her sentence has been barred by the lapse of time or if he or she has been pardoned; (c) if an appropriate security measure has been imposed on the mentally ill offender in a foreign country; or (d) if prosecution of the offence under a foreign law requires a request by the injured party and if such a request has not been made.

Sri Lanka

49. The Extradition Act No. 08 of 1977 provides the basic legal regime to deal with requests for extradition of fugitive offenders received from designated Commonwealth countries or treaty States.

50. Furthermore, the enabling legislations introduced to give effect to international treaties relating to the suppression of serious international crimes which contain the obligation to extradite or prosecute, include necessary provisions to amend the Extradition Act No. 08 of 1977; inter alia, they provide that offences under the said convention are to be treated as extraditable offences and to treat the convention as the basis for extradition in the absence of an extradition treaty with a foreign State. These enabling laws are the following: the Offences against Air Craft Act No. 24 of 1982; the SAARC Regional Convention on Suppression of Terrorism Act No. 70 of 1988; the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation Act No. 31 of 1996; the Suppression of Terrorist Bombings Act No. 11 of 1999; the Prevention of Hostage Taking Act No. 41 of 2000; the Suppression of Unlawful Acts against the Safety of Maritime Navigation Act No. 42 of 2000; and the Convention on the Suppression of Terrorist Financing Act No. 25 of 2005.

United States of America

51. The United States has no domestic legal provisions concerning the obligation to extradite or prosecute. Indeed, as noted above, United States extradition law is clear in setting forth that it shall continue in force only during the existence of any treaty of extradition with a foreign Government (18 U.S.C. §3181(a)).

D. Judicial practice of a State reflecting the application of the obligation *aut dedere aut judicare*

Latvia

52. There is not much judicial practice of Latvia reflecting the application of the obligation *aut dedere aut judicare*. In 2006, Latvia received three requests for legal assistance concerning the extradition of persons for criminal prosecution. Two of them are still in process. One of them has been fulfilled.

Serbia

53. In practice, Serbia allows, as a rule, extradition of a foreigner to a foreign country for offences committed in that foreign country. Hence, for example, in the last 10 years extradition requests have been denied only in very few instances, primarily because nationals of Serbia were involved. The said individuals have not been proceeded against in Serbia since their offences have not fulfilled the conditions required to consider them as offences under international instruments providing for the obligation to extradite or prosecute. In all the instances concerned, Serbia has not been requested by any country to try these individuals, nor has it been provided with evidentiary material supporting the institution of criminal proceedings against them.

54. There are many more instances in practice where foreign countries have declined the extradition requests made by Serbia. As a matter of fact, such individuals are neither prosecuted nor stand trial in the countries which have refused to extradite them. Instead, they are released and sometimes, later on, extradited by other countries where they happen to be found and arrested on an international search warrant.

Sri Lanka

55. In the Supreme Court judgement on *Ekanayake* v. *Attorney General* (SLR 1988 (1) Pg. 46), the following International Conventions which contain the obligation to extradite or prosecute were taken into consideration: (a) the Convention on Offences and Certain Other Acts committed on Board Aircraft, 1963; (b) the Convention for the Suppression of Unlawful Seizure of Aircraft, 1970; and (c) the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1971. The case involved the hijacking of an Alitalia aircraft to Bangkok by a Sri Lankan national. The offender was prosecuted before the High Court of Colombo, under the Offences against Aircraft Act No. 24 of 1982 and convicted.

United States of America

56. Judicial practice in the United States is consistent with the understanding that the obligation to extradite or prosecute is tethered firmly to international conventions. So, for example, in *U.S. v. Yousef*, 327 F.3d 56 (2d Cir. 2003), a United States court of appeals held that the Montreal Convention creates "a jurisdictional agreement among contracting States to extradite or prosecute offenders who commit the acts proscribed by the treaty" (Id. at 96). The United States Government is not aware of any judicial decisions in the United States that apply the obligation except as set forth in conventions to which the United States is a party.

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A. International treaties by which a State is bound, containing the obligation to extradite or prosecute (*aut dedere aut judicare*), and reservations made by that State to limit the application of this obligation

Kuwait

1. The obligation to extradite or prosecute (*aut dedere aut judicare*) is governed by the agreements on legal and judicial cooperation which the Government of the State of Kuwait has concluded with other States, in accordance with the objectives of the extradition regime, namely State cooperation in combating crime and achieving justice.

2. Those international agreements, upon becoming fully binding, be it through ratification, accession or approval, come into effect as enforceable law under the legal system of the State of Kuwait. Such agreements include: the Agreement on Mutual Extradition between the Government of the State of Kuwait and the Government of the Republic of Lebanon, 20 July 1963;[1] the Agreement on Legal and Judicial Cooperation in Civil, Commercial and Criminal Matters and Matters of Personal Status between the State of Kuwait and the Arab Republic of Egypt, 6 April 1977;[2] the Agreement on Legal and Judicial Cooperation in Civil and Criminal Matters and Matters of Personal Status between the State of Kuwait and

[1] Approved pursuant to Act No. 6 of 1962.
[2] Ratified pursuant to Decree-Law No. 96 of 1977.

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the Republic of Tunisia, 13 June 1977;[3] the Agreement on Legal and Judicial Cooperation in Civil, Commercial and Criminal Matters between the State of Kuwait and the Republic of Bulgaria, 26 December 1988;[4] the Agreement on Legal and Judicial Cooperation in Civil, Commercial and Criminal Matters between the State of Kuwait and the Republic of Turkey, 24 March 1997;[5] and the Agreement on Legal and Judicial Cooperation in Civil and Commercial Matters, Matters of Personal Status, the Transfer of Convicted Persons and the Settlement of Estates between the State of Kuwait and the Syrian Arab Republic, 28 June 1999.[6]

B. Domestic legal regulations adopted and applied by a State, including constitutional provisions and penal codes of criminal procedures, concerning the obligation to extradite or prosecute

Kuwait

3. The international agreements mentioned in paragraph 2 by which the Government of the State of Kuwait has become bound, constitute applicable legislation on the basis of which rulings are to be handed down by the courts and the provisions of which are to be applied in all matters relating to extradition. They cover cases in which extradition is compulsory, those in which it is not permissible, the conditions that must be fulfilled for an offence to be extraditable, the authorities to be addressed under such agreements, including for the transmittal of extradition requests, the manner of submission of such requests, extradition priority in the event of multiple requests for extradition for the same offence, the trial and prosecution of the person whose extradition is requested, the rights of well-intended third parties, the travel of persons whose extradition has been decided from other countries through the territory of the States parties, the costs of extradition and other questions relating to extradition.

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[3] Ratified pursuant to Decree-Law No. 123 of 1977.

[4] Ratified pursuant to Decree-Law No. 19 of 1989.

[5] Ratified pursuant to Decree-Law No. 46 of 1998.

[6] Ratified pursuant to Decree-Law No. 3 of 2004.

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The obligation to extradite or prosecute (*aut dedere aut judicare*)

Comments and information received from Governments

Addendum 4

II. Comments and information received from Governments

Poland

A. International treaties by which a State is bound, containing the obligation to extradite or prosecute (*aut dedere aut judicare*), and reservations made by that State to limit the application of this obligation

1. Poland is party to various international instruments dealing with extradition or containing a clause on the obligation to extradite or prosecute,[1] namely: the International Convention for the Suppression of Counterfeiting Currency, and Optional Protocol, Geneva, 1929; the Geneva Conventions (the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 1949; the Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, 1949; the Convention relative to the Treatment of Prisoners of War, 1949; and the Convention relative to the Protection of Civilian Persons in Time of War, 1949); the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, opened for signature at Lake Success, New York, 1950; the European Convention on Extradition, Paris, 1957, its Additional Protocol of 1975, and its

[1] The details of multilateral treaties previously cited are not reproduced in the present addendum as they can be found in the original report (A/CN.4/579) and its first addendum (A/CN.4/579/Add.1).

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Second Additional Protocol of 1978;[2] the Single Convention on Narcotic Drugs, New York, 1961; The Convention for the Suppression of Unlawful Seizure of Aircraft, The Hague, 1970; the Convention on Psychotropic Substances, Vienna, 1971; the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Montreal, 1971; the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, New York, 1973; the European Convention on the Suppression of Terrorism, Strasbourg, 1977; the International Convention against the Taking of Hostages, New York, 1979; the Convention on the Physical Protection of Nuclear Material with Annex I and II, Vienna and New York, 1980; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 1984; the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Rome, 1988; the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, Rome, 1988; the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Vienna, 1988; the Convention on the Safety of United Nations and Associated Personnel, New York, 1994; the International Convention for the Suppression of Terrorist Bombings, New York, 1998; the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Paris, 1997; the Criminal Law Convention on Corruption, Strasbourg, 1999; the International Convention for the Suppression of the Financing of Terrorism, New York, 1999; the United Nations Convention against Transnational Organized Crime, New York, 2000; the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, New York, 2000; the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, New York, 2000; and the United Nations Convention against Corruption, New York, 2003.

2. Poland has also signed several bilateral treaties on extradition and legal assistance: the Treaty with the United Kingdom of Great Britain and Northern Ireland for the Surrender of Fugitive Criminals, Warsaw, 11 January 1932; the Agreement with the People's Democratic Republic of Algeria on legal relations regarding civil and criminal affairs, Algiers, 9 November 1976; the Agreement with the Kingdom of Morocco on legal assistance in civil and criminal affairs, Warsaw,

[2] Regarding those instruments, Poland made a Declaration contained in the instrument of ratification, deposited on 15 June 1993, in which the Republic of Poland declared in accordance with paragraph 1 (a) of article 6, that it would under no circumstances extradite its own nationals and that, for the purposes of the Convention in accordance with paragraph 1 (b) of article 6, persons granted asylum in Poland would be treated as Polish nationals. Later, the Republic of Poland made another declaration contained in a letter dated 24 February 2005 from the Permanent Representative of Poland and registered at the Secretariat on 24 February 2005 which read as follows: "in accordance with article 28, paragraph 3, of the Convention, the Republic of Poland hereby declares that since 1 May 2004 in relations with the member States of the European Union, it will apply the internal legal provisions implementing the provisions of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between member States (2002/5 84/JHA) insofar as the Framework Decision is applicable in relations between Poland and these States". The provisions of the aforementioned Framework Decision were implemented in Polish law by virtue of the statute amending the Penal Code, the Code of Criminal Procedure and the Code of Misdemeanours, dated 18 March 2004.

21 May 1979; the Agreement with the Republic of Cuba on legal assistance in civil, domestic and criminal affairs, Havana, 18 November 1982; the Agreement with the Syrian Arab Republic on legal assistance in civil and criminal affairs, Damascus, 16 February 1985; the Agreement with the Republic of Tunisia on legal assistance in civil and criminal affairs, Warsaw, 22 March 1985; the Agreement with the Great Socialist People's Libyan Arab Jamahiriya on legal assistance in civil, commercial, domestic and criminal affairs, Tripoli, 2 December 1985; the Agreement with the Democratic People's Republic of Korea on legal assistance in civil, domestic and criminal affairs, Pyongyang, 28 September 1986; the Agreement with the Republic of Iraq on legal and judicial assistance in civil and criminal affairs, Baghdad, 29 October 1988; the Agreement with the Arab Republic of Egypt on legal assistance in criminal affairs, transfer of sentenced persons and extradition, Cairo, 17 May 1992; the Agreement with the Socialist Republic of Vietnam on legal assistance and legal relations concerning civil, domestic and criminal affairs, Warsaw, 22 March 1993; the Agreement with the Republic of Belarus on legal assistance and legal relations regarding civil, domestic, employment and criminal affairs, Minsk, 26 October 1994; the Extradition Treaty with the United States of America, Washington, 10 July 1996; the Agreement with the Slovak Republic on supplementation and facilitation of the implementation of the 1957 European Convention, Jaworzyna Tatrzanska, 23 August 1996; the Treaty with Australia on extradition, Canberra, 3 June 1998; the Agreement with Mongolia on legal assistance and legal relations in civil, domestic, employment and criminal affairs, Warsaw, 19 October 1998; the Extradition Treaty with the Republic of India, New Delhi, 17 February 2003; and the Agreement with the Federal Republic of Germany on supplementation and facilitation of the implementation of the 1957 European Convention on extradition, Berlin, 17 July 2003.

B. Domestic legal regulations adopted and applied by a State, including constitutional provisions and penal codes or codes of criminal procedures, concerning the obligation to extradite or prosecute

3. The Constitution of the Republic of Poland was adopted by the National Assembly on 2 April 1997. Its article 55 reads as follows:

> "1. The extradition of a Polish citizen shall be prohibited, except in cases specified in paragraphs 2 and 3.
>
> "2. Extradition of a Polish citizen may be granted upon a request made by a foreign State or an international judicial body if such a possibility stems from an international treaty ratified by Poland or a statute implementing a legal instrument enacted by an international organization of which the Republic of Poland is a member, provided that the act covered by a request for extradition:
>
> (1) Was committed outside the territory of the Republic of Poland;
>
> (2) Constituted an offence under the law in force in the Republic of Poland or would have constituted an offence under the law in force in the Republic of Poland if it had been committed within the territory of the Republic of Poland, both at the time of its commitment and at the time of the making of the request.

"3. Compliance with the conditions specified in paragraph 2, subparagraphs (1) and (2) shall not be required if an extradition request is made by an international judicial body established under an international treaty ratified by Poland, in connection with a crime of genocide, crime against humanity, war crime or a crime of aggression, covered by the jurisdiction of that body.

"4. The extradition of a person suspected of the commission of a crime for political reasons but without the use of force shall be forbidden, so as an extradition which would violate rights and freedoms of persons and citizens.

"5. The courts shall adjudicate on the admissibility of extradition".

Further, article 604 of the Code of Criminal Procedure, Act of 6 June 1997, provides:

"1. Extradition is inadmissible if:

(1) The person to whom such a motion refers is a Polish citizen or has been granted the right of asylum in the Republic of Poland;

(2) The act does not have the features of a prohibited act, or if law stipulates that the act does constitute an offence, or that the perpetrator of the act does not commit an offence or is not subject to penalty;

(3) The period of limitation has lapsed;

(4) The criminal proceedings have been validly concluded concerning the same act committed by the same person;

(5) The extradition would contravene Polish law;

(6) There is a justifiable concern that the prosecuted person may be sentenced to the death penalty or that the death penalty may be executed in the State requesting the extradition;

(7) There is a justifiable concern that rights and freedoms of the prosecuted person may be infringed in the State requesting the extradition;

(8) It concerns the person prosecuted for offences committed without violence for political reasons.

"2. In particular, extradition may be refused, if:

(1) The person to whom such a motion refers has permanent residence in the Republic of Poland;

(2) The criminal offence was committed within the territory of the Republic of Poland, or on board a Polish vessel or aircraft;

(3) Criminal proceedings are pending concerning the same act committed by the same person;

(4) The offence is subject to prosecution on a private charge;

(5) Pursuant to the law of the State which has moved for extradition, the offence committed is subject to the penalty of deprivation of liberty for a term not exceeding one year, or to a lesser penalty or such a penalty has been actually imposed;

(6) The offence with which the motion for extradition is connected is of a military, fiscal or political nature other than that referred to in paragraph 1 subsection 8; or

(7) The State which has moved for extradition does not guarantee reciprocity in this matter.

"3. In the event indicated in paragraph 1 subsection 4 and paragraph 2 subsection 3, the resolution of the motion for extradition may be adjourned until the criminal proceedings pending against the same person in the Republic of Poland are concluded, or until he has served the sentence imposed or has been granted remission of the penalty."

C. Judicial practice of a State reflecting the application of the obligation *aut dedere aut judicare*

4. Pursuant to the Code of Criminal Procedure, applications of foreign States for the extradition of prosecuted or convicted persons are subject to court rulings. In deciding on the admissibility of extradition, the court is guided by the aforementioned provisions of the Constitution and the Code of Criminal Procedure. The court ruling on extradition is subject to appeal by the prosecuted person and the prosecutor. During the years from 2004 to 2007, the courts usually determined inadmissibility of extradition of the basis of the provisions of article 604, paragraph 1 subsections 5 and 7 of the Code of Criminal Procedure, namely, incompatibility of extradition with Polish law, or justified concern that the freedoms and rights of the extradited person would be violated in the State seeking extradition.

5. The final decision on the application of a foreign State for extradition is taken by the Minister for Justice of the Republic of Poland. Only a ruling in which the court determines inadmissibility of extradition is binding on the Minister for Justice. On the other hand, the Minister is entitled to deny extradition even if the court finds that it is admissible. In taking the final decision, the Minister for Justice is guided by criminal policy considerations. However, pursuant to the resolution of the Supreme Court of 17 October 1996, the Minister cannot refuse extradition by making an independent ascertainment of facts that differs from the ascertainment made by the court in its ruling on the admissibility of extradition. The Minister's decisions on extradition are not subject to appeal. In practice, during the period from 2004 to 2007 there have been no instances of the Minister for Justice refusing extradition despite a court ruling allowing extradition.

6. In 2004, four extradition requests have been refused out of 63; in 2005, 10 extradition requests were refused out of 27; in 2006, four were refused out of 24; and in 2007, so far, there have been three requests of extraditions.

7. An analysis of extradition proceedings conducted during the years from 2004 to 2007 indicates that the complete procedure, from the lodging of the application by a foreign State until the decision of the Justice Minister, lasts on average seven months.

D. Crimes or offences to which the principle of the obligation *aut dedere aut judicare* is applied in the legislation or practice of a State.

8. Prosecuted or convicted persons may be extradited upon the application of a foreign State in connection with the commission of any crimes or offences covered by international treaties binding on the Republic of Poland. During the period from 2004 to 2007, the extradition applications of foreign States usually referred to offences against property and life and health, and those involving forgeries.